

*a***PUBLIC PROSECUTOR**

v.

MUHAMAD SULAIMAN

FEDERAL COURT, KUALA LUMPUR

SUFFIAN LP

b

WAN SULEIMAN FJ

ABDUL HAMID OMAR FJ

[CRIMINAL APPEAL NO. 27 OF 1981]

24 AUGUST 1982

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CRIMINAL PROCEDURE: *Jury trial - Judge's duty at the end of prosecution case - Circumstantial evidence - Deceased died as a result of gun shot wound - Bullet fired from rifle issued to accused - Chemist's evidence - Whether admissible - Ruling by Judge - Competency as an expert in firearms - Whether jury to decide - Chemist expert or not - Question of weight and not admissibility.*

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This was an appeal against the decision of the High Court, Kuantan sitting with a jury in acquitting and discharging the respondent, a Lance-Corporal in the Army on a charge of murder.

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In July 1978, the 13th Royal Malay Regiment platoons were on operation against communist terrorists in Raub in which the respondent was a member of Platoon No. 12 under the command of Sergeant Mokhtar bin Hj. Salim, now deceased. During the night of 14 July at or about 11.00 p.m. while the privates were sleeping in hammocks, in pitch dark under rain, thunder and lightning, a gun fire was heard. In the morning, the Sergeant was found dead in his hammock; he had been shot. A bullet recovered from the deceased's left upper arm was examined by Mr. Lum Kon Woon (PW36) a Government Chemist. He also test-fired the weapons of all the members of the platoon and gave evidence that the bullet must have been fired from the rifle which had been issued to the respondent prior to the night of the incident. There was no other evidence to connect the respondent with the killing apart from the evidence of the Chemist.

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The learned trial Judge at the end of the prosecution case after considering the submission of the defence Counsel and the reply of the learned Deputy Public Prosecutor was of the opinion that there was no case for the accused to answer and directed the Jury to return a verdict of not guilty pursuant to s. 214(i) of the Criminal Procedure Code which they did. He ruled that the Chemist's evidence was not admissible because (1) there was inadequate evidence of his competency as an expert in firearms and in the identification of the rifle from which the bullet had been fired and (2) the Chemist had not produced the date, photos, etc., on which he had based his conclusion.

At the appeal, the learned Deputy Public Prosecutor argued that the learned Judge was wrong in:

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- (i) not treating the Chemist as a person "specially skilled" in determining whether the bullet (P7) had been fired with the respondent's rifle;
- (ii) in thinking that the Chemist's failure to produce the data that he had or should have collected to enable him to determine that the bullet had so been fired, was fatal for the purpose of determining whether or not the Chemist was an expert;

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(iii) in rejecting the Chemist's evidence, considering that it had not been destroyed in cross-examination.

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The learned Deputy Public Prosecutor submitted that the learned Judge should have left it to the Jury to decide whether or not Mr. Lum, the Chemist, was an expert and if so, what weight to be given to his evidence. Finally, he submitted that in the circumstances, the Federal Court should order a retrial.

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Held:

[1] Although the expert (Chemist) must be "skilled", he need not be so by special study, he may be so by **experience**; and the fact that he had not acquired his knowledge professionally goes merely to weight and not to admissibility.

[2] By virtue of the Chemist's education, his scientific qualification, his practical experience gained in the Department and the fact that his evidence on gun and bullet given similar to that in this case in other Courts, and accepted as expert evidence might be regarded as an expert for the purpose of determining whether or not the bullet (P7) had been fired through the respondent's rifle, especially considering that he had not been shaken in cross-examination.

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[3] The learned Judge was erroneous in treating the Chemist as a non-expert. He should have treated the evidence of the Chemist as admissible and left the question of its weight or value to the jury.

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[4] Failure on the part of the Chemist to produce the data, photos, etc., on which he had based his findings was not fatal, for in fact, he was not asked by the defence to produce them, and if he had been asked he might have produced them.

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[5] The learned Judge should have let the case to go on and not direct the Jury to return a verdict of not guilty.

[6] The record shows that the case against the accused is not strong, being dependent on rather thin circumstantial evidence, and had the learned Judge directed his mind to this alone he would have been justified in applying s. 214(i) of the Criminal Procedure Code and in view of this, there will be no order for a retrial.

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[Appeal disallowed. Order accordingly.]

Cases referred to:

The Queen v. Silverlock [1894] 2 QB 766

Public Prosecutor v. Virammal [1923] AIR Madras 178

Haw Tua Tau v. PP [1981] CLJ (Rep) 11

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Legislation referred to:

Criminal Procedure Code, ss. 190, 214(i), (ii)

Criminal Procedure Code [Sing], ss. 188(1), 194, (1), (2)

Evidence Act 1950, s. 45

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Other source referred to:

Phipson on Evidence, 11th Edn., says in para. 1285

For the public prosecutor - Sheik Daud

For the accused - Joseph Au (assigned)

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*a***JUDGMENT****Suffian LP:**

This is an appeal from a decision of the High Court sitting with a jury in Kuantan acquitting and discharging the accused as directed by the learned Judge pursuant to s. 214(i) of the Criminal Procedure Code.

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The respondent (whom I shall refer to as the accused) was a Lance-Corporal in the Army. He was charged with murdering his Sergeant.

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In July 1978, the 13th Royal Malay Regiment was on operations against communist terrorists in the district of Raub, Pahang. Twelve platoons were deployed in different places. Platoon No. 12 under the command of Sergeant Mokhtar bin Haji Salim, of which the accused was a member, was deployed in a rubber estate in Lembah Klau. They slept in hammocks. The hammocks of the privates were arranged in a circle covering an area twice the size of a tennis court. In the middle of this circle were the hammocks of the Sergeant and four Corporals including the accused.

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During the night of 14 July, at about 11 p.m. gun fire was heard. It was pitch dark and raining and there was thunder and lightning. In the morning the Sergeant was found dead in his hammock; he had been shot. A bullet P7 was recovered from his left upper arm. Mr. Lum Kon Woon PW 36, a Chemist with the Government Chemistry Department in Petaling Jaya, examined the bullet. He test-fired the weapons of all the members of the platoon and examined their bullets; and gave evidence that P7 must have been fired from the rifle P36 which had been issued to the accused prior to the night of 14 July. He came to that conclusion from a study of the markings on the bullets examined. That was the only evidence connecting the accused with the killing and without that evidence there would be no case against him. Nobody saw who had shot the Sergeant.

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The learned Judge at the end of the prosecution case after considering the submission of Mr. Au (assigned Counsel for the defence) and the reply by the learned DPP, was of the opinion that there was no case for the accused to answer. He ruled that Mr. Lum's evidence was not admissible because (1) there was inadequate evidence of his competency as an expert in firearms and in the identification of the rifle from which the bullet P7 had been fired and (2) Mr. Lum had not produced the data, photos, etc., on which he based his conclusion. Accordingly, the learned Judge directed the Jury under s. 214(i) of the Criminal Procedure Code to return a verdict of not guilty, which they did.

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Sheikh Daud on behalf of the PP, appellant, argues that the learned Judge was wrong in (i) not treating Mr. Lum as a person "specially skilled" in determining whether the bullet P7 had been fired with the accused's rifle; (ii) in thinking that Mr. Lum's failure to produce the data that he had or should have collected to enable him to determine that the bullet had so been fired, was fatal for the purpose of determining whether or not Mr. Lum was an expert, and (iii) in rejecting Mr. Lum's evidence, considering that it had not been destroyed in cross-examination. Sheikh Daud submits that the learned Judge should have left it to the jury to decide whether or not Mr. Lum was an expert and if so what weight to give to his evidence. Finally he submits that in the circumstances we should order a retrial.

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It is now convenient for us to reproduce s. 45 of the Evidence Act. It reads as follows:

(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon the point of persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

As to the question whether or not Mr. Lum is an expert, it is true that this is a preliminary question to be determined, but it is a question upon which, in practice, considerable laxity prevails. This is because while the expert must be “skilled”, he need not be so by special study, he may be so by experience; and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

In *The Queen v. Silverlock* [1894] 2 QB 766, identity of handwriting was in question and a solicitor was called to give evidence on it, and Lord Russell CJ said at p. 771:

It is true that the witness who is called upon to give evidence founded on a comparison of hand-writings must be peritus; he must be skilled in doing so; but we cannot say that he must become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?

Phipson on *Evidence* 11th Edn., says in para. 1285:

The competency of the expert is a preliminary question for the Judge and is one upon which, in practice considerable laxity prevails. Though the expert must be ‘skilled’, by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

and the learned author cites *Silverlock* as his authority for the above proposition.

At the bottom of p. 511 the learned author after saying that the opinions of medical men are admissible upon questions within their own province, remarked that even the evidence of unqualified medical practitioners, hospital students and dressers is admissible in appropriate circumstances.

To return to Mr. Lum, he has a B.Sc. (Honours) degree from the University of Malay, and a diploma in environmental science and technology from Delft, Holland; he is 38; he works full time in the Department of Chemistry. As to firearms the evidence was that he was trained in the Department by his predecessors who were themselves trained forensic chemists having been trained overseas. Prior to this case he had examined other guns and bullets and had given gun and bullet evidence similar to that in this case in other Courts, and his evidence had been accepted as expert evidence.

In view of this we are of the opinion that the learned Judge was erroneous in treating him as a non-expert.

Mr. Lum admitted that he had no academic training in forensic ballistics; but just as a person without academic or professional qualification in handwriting may give evidence on the identity of handwriting, so Mr. Lum by virtue of his education, his scientific qualification and his practical experience gained in the Department might be regarded as an expert for the purpose of determining whether or not the bullet P7 had been fired through the accused’s rifle, especially considering that Mr. Lum had not been shaken in cross-examination.

a The only question was, is Mr. Lum peritus, is he skilled, in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.

b Mr. Lum gave the evidence disallowed in front of the jury. That was because there was then no objection by Counsel to its admission; he objected to it only in his submission at the end of the prosecution case.

The learned Judge should have treated the evidence as admissible and left the question of its weight or value to the jury. If he had left this matter to the jury it would not necessarily follow that they would have agreed that the bullet P7 had gone through the accused's rifle

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Regarding the question whether or not Mr. Lum's failure to produce the data, photos, etc., on which he based his finding, with respect we do not agree that that was fatal, for in fact he was not asked by the defence to produce them, and if he had been asked he might have produced them. A doctor when testifying in Court is not required to produce photographs to prove their findings and in the usual kind of cases there is no reason why firearms experts like Mr. Lum should produce photographs to prove their findings.

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In *Public Prosecutor v. Virammal* [1923] AIR Madras 178, some finger-prints were in question. The lower Court rejected the evidence of a fingerprint expert on general grounds. Oldfield J remarked that that attitude was unsound. He said at p. 179:

e That attitude ... may have been due to [the lower Court's] reluctance to enter into ... the 'science' of finger-prints or to come to close quarters with the evidence of a person described as an 'expert'.

Next follow these significant words:

f But in fact there is nothing in the so-called science of fingerprints or the qualifications of an expert in it, which need have deterred the lower Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness.

Here Mr. Lum described the nature of a rifle, said that the inside of its barrel had tiny grooves, that a bullet passing through it bears characteristic markings made by the grooves different from markings on a bullet that had passed through other rifles, and that the bullet in question

g bears markings similar to those that had been test-fired with the accused's rifle. As the lower Court in *Virammal* could have applied its own magnifying glass, or its own eyes, and its own mind to the evidence and verifying the results; so the jurors here, if the case had been allowed to go on, could have used a magnifying glass, or their own eyes and their own mind to the evidence and verifying the results submitted to them by Mr. Lum.

h We now turn to consider a Judge's duty at the end of the prosecution case in a jury trial. Sub-sections (i) and (ii) of s. 214 of the Criminal Procedure Code provide:

(i) When the case for the prosecution is concluded the Court, if it considers that there is no evidence that the accused committed the offence shall direct the jury to return a verdict of not guilty.

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(ii) If the Court considers that there is evidence that the accused committed the offence the Court shall call on the accused to enter on his defence.

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These provisions are *in pari materia* with sub-sections (1) and (2) of s. 194 of the Singapore Criminal Procedure Code before the abolition of jury trial there in 1969.

These provisions are in contrast to our s. 190 which deals with the position in a trial by a Judge with the aid of assessors. Section 190 provides:

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190. When the case for the prosecution is concluded the Court, if it finds no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

Our s. 190 is identical with the present s. 188(1) of the Singapore Criminal Procedure Code which fell to be considered by the Privy Council in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11. In the course of considering the functions of Judges in Singapore under s. 188(1), Lord Diplock drew a distinction between trial by a Judge alone and trial by jury.

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As regards trial by a Judge alone, Lord Diplock observed at p. 51:

When they [i.e. the words 'if unrebutted'] mean is that for the purpose of reaching the decision called for by s. 188(1) the Court must act on the presumptions (a) that all such evidence of primary fact [elicited during the case for the prosecution] is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

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Then Lord Diplock went on to contrast this with the attitude of the Court in a trial with a jury, in the course of which His Lordship said that if there is some evidence which, **if it were to be accepted by the jury as accurate**, would establish each essential ingredient in the alleged offence, the Judge must let the case go on and not direct the jury to acquit and discharge. His Lordship said at pp. 51 and 52:

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The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a Judge and jury, such as occurs in England and occurred in Singapore until its final abolition in 1969. Here the decision-making function is divided; questions of law are for the Judge, questions of facts are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the Judge's function to decide for himself whether evidence has been adduced which, **if it were to be accepted by the jury as accurate**, would establish each essential element in the alleged offence; for what are the elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove one or more of those essential elements, it is the Judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but if there is **some** evidence, the Judge must let the case go on ... On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the Court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

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- a* Here there was evidence that Mr. Lum is a person of good education and considerable experience with firearms and in determining whether a particular bullet had gone through the barrel of a particular rifle; and, applying the test laid down by the Privy Council in *Haw Tua Tau*, the learned Judge should have let the case go on and not direct the jury to return a verdict of not guilty.
- b* Finally there remains the question whether or not we should order a retrial. When during Sheik Daud's reply it was pointed out to him that the alleged offence took place in July 1978 four years ago and owing to the considerable delay it might not be just to order a retrial, he said that he would leave that question to the Court, being more interested in the Court ruling whether or not the learned trial Judge was right in deciding that Mr. Lum was not an expert.
- c* We have examined the record with care and find that the case against the accused is not strong, being dependent on rather thin circumstantial evidence, and had the learned Judge directed his mind to this alone he would have been justified in applying s. 214(i) of the Criminal Procedure Code, and in view of this we decline to order a retrial.

Also found at [1982] CLJ 540

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